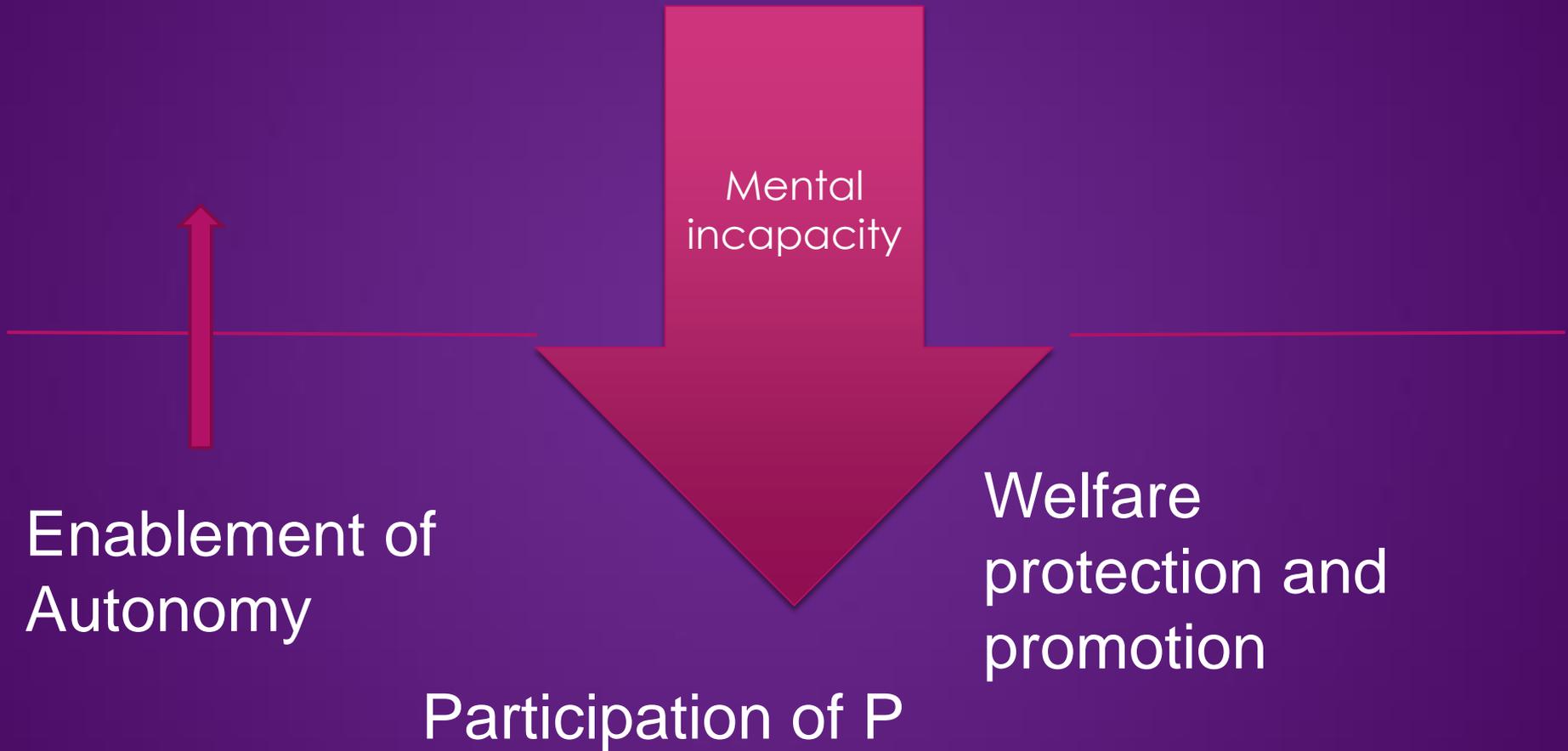


Vulnerability and Mental Incapacity – Paradoxes and Paradigms

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CONCEPTS AND VALUES



The MCA and autonomy

▶ Us and Them

- ▶ Courts generally strive to establish the consenting patient as paradigmatic in the abstract, being then able to use the concrete facts of the case, as constructed largely by medical witnesses to characterise the actual patient as non-paradigmatic, outwith those cases where autonomy and the right to self-determination need to be respected.' John Harrington.

▶ Safeguards liberty rather than autonomy

▶ A lack of autonomy associated with mental disability

That Diagnostic Threshold!

- ▶ Its all about you!
- ▶ The causal nexus – material cause, main cause, material contribution?
- ▶ Unacknowledged impacts on decision making ability – e.g. internalisation of values
- ▶ Commonality of experience is obscured – e.g. domestic abuse strategies

Protecting Welfare - Best Interests

- ▶ Individual problems, individual solutions
- ▶ Accommodation of P's welfare within structural limitations
- ▶ Private not public law challenges before the CoP
- ▶ Are best interests decisions 'wicked'?
 - ▶ "Moreover, the broad question of what is in an incompetent patient's best interests may involve a weighing of conflicting medical and social considerations. And, in regard to treatment, the moral right of the patient to be treated with dignity may pose acute problems."

what about vulnerability?

- ▶ Universal experience but acknowledges that it can be experienced in particular ways by particular groups
- ▶ Challenges the abstract liberal legal subject – connected, dependent
- ▶ Plurality of triggers of vulnerability and interventions that may attend to it
- ▶ Goal of policy = to foster resilience

What can vulnerability bring to the MCA?

- ▶ The importance of fostering resilience through facilitating and supporting capacity
- ▶ Provision of effective options from which choices can be made
 - ▶ Nb public law challenges
- ▶ Recognition of enduring, residual autonomy among those who lack capacity to make a decision.